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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

QUILL CORPORATION,

*Petitioner,*

v.

STATE OF NORTH DAKOTA,  
By and Through Its Tax Commissioner,  
Heidi Heitkamp,

*Respondent.*

On Writ of Certiorari to the  
Supreme Court of North Dakota

BRIEF AMICI CURIAE OF  
AMERICAN COUNCIL FOR THE BLIND  
AMERICAN COUNCIL OF BLIND LIONS  
AMERICAN AGRICULTURE MOVEMENT, INC.  
AMERICAN ASSOCIATION OF HOMES FOR THE AGING  
DISABLED AMERICAN VETERANS  
INDEPENDENT LIVING FOR THE HANDICAPPED, INC.  
NATIONAL ASSOCIATION FOR HOME CARE  
NATIONAL ASSOCIATION OF PEOPLE WITH AIDS  
NATIONAL COMMITTEE TO PRESERVE SOCIAL  
SECURITY AND MEDICARE  
NATIONAL GRANGE  
NATIONAL INDIAN YOUTH COUNCIL, INC.  
PARALYZED VETERANS OF AMERICA  
THE FIGHT BACK! FOUNDATION FOR  
CONSUMER EDUCATION  
VETERANS OF FOREIGN WARS OF THE U.S.A.  
VIETNAM VETERANS OF AMERICA, INC.  
VISUALLY IMPAIRED DATA PROCESSORS  
INTERNATIONAL  
WORLD INSTITUTE ON DISABILITY  
IN SUPPORT OF PETITIONER

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**BRIEF AMICI CURIAE  
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**INTERESTS OF AMICI CURIAE**

**A. Amici**

**AMERICAN COUNCIL FOR THE BLIND**

The American Council for the Blind is a District of Columbia nonprofit organization that was founded in 1961. Its membership consists of tens of thousands of the blind and visually impaired. The Council has 52 state and regional affiliates and 21 national special



interest and professional affiliates. The Council strives to improve the well-being of all blind and visually impaired people by, *inter alia*, improving educational and rehabilitation facilities and opportunities and attempting to maximize the access of the blind and visually impaired to all services and facilities, both public and private.

#### **AMERICAN COUNCIL OF BLIND LIONS**

The American Council of Blind Lions is an organization of LIONS (members of LIONS Clubs International) who are blind or visually impaired. There are members of the organization throughout all 50 United States. The purpose of the organization is to attempt to ensure that the LIONS Clubs International continue the challenge of Helen Keller to be the knights of the blind, and to seek to ensure that necessary services and supplies are provided to the blind.

#### **AMERICAN AGRICULTURE MOVEMENT, INC.**

The American Agriculture Movement, Inc. is a 501(c)(5) organization incorporated as a nonprofit corporation in the State of Arkansas. Its purpose is to represent family farmers to permit the continuation of the small family farm. The wide-spread availability of mail order merchandising, providing an array of products at reasonable prices, is important to the continuation of the family farm.

#### **AMERICAN ASSOCIATION OF HOMES FOR THE AGING**

The American Association of Homes for the Aging is a national nonprofit 501(c)(3) trade association, incorporated in the State of New York. It represents 4,000 not-for-profit facilities providing health care,

housing, continuing care retirement programs, and community services to more than 500,000 older individuals. Its activities include enhancing its members' financial strength and ensuring that the needs of its elderly constituencies are met.

#### **DISABLED AMERICAN VETERANS**

The Disabled American Veterans is a Congressionally chartered nonprofit organization of disabled veterans with members throughout the nation. Additionally, there are 200,000 members of the DAV Auxiliary. The organization provides a broad spectrum of services free of charge to disabled veterans and members of their families, with a strong emphasis on assisting these veterans and families in obtaining earned benefits as a result of their military service.

#### **INDEPENDENT LIVING FOR THE HANDICAPPED, INC.**

Independent Living for the Handicapped, Inc. (ILH) is a 501(c)(3) organization chartered in the District of Columbia. Its purpose is to help physically disabled, mentally normal adults live independent lives in the community instead of totally dependent lives in institutions. Primary efforts are in behalf of mobility-impaired people who use wheelchairs. ILH operates a single-family residence that accommodates five people using wheelchairs and one 20-unit apartment house that was specifically designed and built for wheelchair users.

#### **NATIONAL ASSOCIATION FOR HOME CARE**

The National Association for Home Care ("NAHC"), based in Washington, D.C., represents the interests of home care patients and providers of such services

nationwide. Since 1981, NAHC has maintained its mission to improve access to home care services as a humane, viable, and cost-effective alternative for chronically ill children. NAHC's membership includes individuals, professional caregivers, providers of home care services, and organizations interested in providing care in the home setting. NAHC has been in the forefront of home care patient advocacy efforts nationwide in legislative, regulatory, and judicial forums. For example, it was NAHC, on behalf of home care patients across the country, which successfully challenged the attempted dismantling of the Medicare home health benefit by the federal Health Care Financing Administration in *Duggan v. Bowen*, 691 F. Supp. 1487 (D.D.C. 1988).

#### **NATIONAL ASSOCIATION OF PEOPLE WITH AIDS**

The National Association of People with AIDS, a District of Columbia nonprofit corporation, is a national nonprofit, 501(c)(3) organization chartered to represent the voice of people living with HIV disease in the United States. Through programs in information and referral, technical assistance, and advocacy, the organization seeks to empower the HIV-infected community and works to ensure that the needs of those infected are adequately addressed by both the private and public sectors. NAPWA counts as its constituency the 1.5-million Americans currently living with HIV disease.

#### **NATIONAL COMMITTEE TO PRESERVE SOCIAL SECURITY AND MEDICARE**

The National Committee To Preserve Social Security and Medicare is a District of Columbia nonprofit

corporation with about five million members and supporters throughout the United States. Its purpose is to represent, protect, and promote the interests of its millions of members under the Federal Old Age, Survivors and Disability Insurance Program and the Medicare Program. Its purposes include promoting its members' health and welfare, quality of life, pensions, and interests related thereto.

#### **NATIONAL GRANGE**

The National Grange is a rural community service organization with a special interest in agriculture. The Grange is a nonprofit organization headquartered in Washington, D.C. with approximately 325,000 members. Founded in 1897, it is the country's first general farm organization. Its purposes include attempting to ensure the well-being of its members as rural residents. The continued vitality of mail order merchandising is particularly important to its rural members.

#### **NATIONAL INDIAN YOUTH COUNCIL, INC**

The National Indian Youth Council, Inc. is a New Mexico nonprofit corporation which was founded in 1961. It has over 15,000 members nationwide. Its purpose is to enhance and preserve the rights of Indian people in a broad variety of areas including preserving Indian culture and assisting its members in the private and public sectors of the country. Its members are dominantly rural.

#### **PARALYZED VETERANS OF AMERICA**

The paralyzed Veterans of America (PVA) is a nonprofit organization chartered by the Congress of the United States. The statutory purposes of PVA include



the formation of an association for the benefit of persons who have suffered spinal cord injury or disease, the promotion of medical research in several fields connected with the disabilities shared by the membership and acquainting the public with the needs and problems of paraplegics. PVA has over 15,000 members and has thirty-three chapters and thirteen sub-chapters throughout the United States and Puerto Rico.

PVA is dedicated to servicing the needs of its members—all of whom suffer from catastrophic paralysis caused by spinal cord injury or disease. To advance the needs and legal rights of its members, PVA has for years been active in litigation and administrative and legislative advocacy on behalf of persons with disabilities. It has initiated or joined in legal action to advocate the interests of its members in actions concerning transportation, housing, equal access in public accommodations, education, and other related issues.

#### **THE FIGHT BACK! FOUNDATION FOR CONSUMER EDUCATION**

The Fight Back! Foundation for Consumer Education is an organization that seeks to increase consumer awareness. It works with business and consumer groups and various government agencies to attempt to resolve major issues in the marketplace.

#### **VETERANS OF FOREIGN WARS OF THE U.S.A.**

The Veterans of Foreign Wars of the U.S.A., chartered as a nonprofit corporation by the United States Congress, was founded in 1899 and has over 2.2 million members throughout the United States. There

are over 10,000 local affiliates. The VFW engages in a wide variety of activities on behalf of its members and also promotes numerous charitable activities. Its purposes include attempting to ensure that its members have maximum access to the goods and services of the American marketplace. Many of the members are elderly or disabled. Those persons benefit greatly from shopping by mail order.

#### **VIETNAM VETERANS OF AMERICA, INC.**

Vietnam Veterans of America, Inc. (VVA) is a nonprofit veterans service organization incorporated in New York state and nationally headquartered in Washington, D.C. There are over 43,000 members in all 50 states with some 516 individually incorporated active affiliate chapters. The purpose of the organization is to provide services to veterans whether or not they are members of VVA. In particular, veterans are helped to develop claims for federal benefits administered through the Department of Veterans Affairs (VA). In addition, many of VVA's chapters offer employment and training assistance, develop and foster programs for homeless and other economically disadvantaged veterans and promote the organization's legislative agenda before the United States Congress and the Executive Branch.

#### **VISUALLY IMPAIRED DATA PROCESSORS INTERNATIONAL**

Visually Impaired Data Processors International is a District of Columbia nonprofit organization of blind and visually impaired data processing professionals. The organization seeks to assist its members by enhancing and promoting the abilities of blind people in

the field of data processing. It has members throughout the United States. The organization is vitally concerned with hardware, software, and data processing accessories many of which are purchased through mail order.

### WORLD INSTITUTE ON DISABILITY

The World Institute on Disability was founded in 1983. Its purpose is to assist in seeking solutions to problems of those who are disabled. It is particularly interested in assisting the disabled, including the disabled elderly, in promoting equality of opportunity and full and equal participation within all facets of the economic and social life of the country.

#### B. General Statement

Many of the Amici parties to this brief are organizations seeking to assist those suffering from various kinds of disabilities or burdened by special consumer challenges. For the consumers represented by those organizations, the continued existence of a healthy mail order industry goes beyond even the laudable goal of ensuring maximum consumer choices. For persons unable to utilize retail facilities to purchase the products necessary for day-to-day life, the availability of a wide range of mail order goods is more than a convenience; it is a necessity.

The disabled population of this country is substantial. There are over 32 million U.S. residents with serious activity-limiting conditions. *Statistical Abstract of the United States* at 119 (110th ed. 1990). All consumers have an interest in maintaining a maximum degree of competition to ensure both reasonable prices and a wide range of products. For those for

whom ordinary shopping is difficult or impossible, products necessary for a reasonable life will remain available only if the mail order industry remains healthy and competitive. This applies not only to such mundane items as clothing or housewares but also to products needed in order to cope with particular disabilities.

For example, many mail order consumers suffer mobility impairment. Virtually all of these consumers require the use of specialized medical equipment and other assisting devices to aid them in their day-to-day activities. Because the number of manufacturers and suppliers of these devices is relatively small, those consumers rely, to a great extent, on ordering such items through the mail. Because of their mobility impairment, many of these consumers also shop for everyday items by mail.

Additionally, because of their disabilities, many are unable to engage in sustained gainful employment. These consumers exist on the fixed incomes provided by various forms of disability benefits.<sup>1</sup> The interest of these Amici is to ensure the continued availability of a wide range of mail order retailers and to guard against the certain increase in the cost of items purchased through the mail if the burden of tax collection is placed on mail order businesses.

Like those facing paralysis and other permanent physical challenges, the many persons with illnesses

<sup>1</sup> Households with less than \$30,000 annual income comprise 37.9% of mail order consumers, and nearly one-third of mail order consumers are fifty years old or older. *Simmons Study of Media and Markets* (Simmons Market Research Bureau 1990). It is a myth that mail order buyers are predominantly wealthy individuals buying expensive, luxury products.



who seek to receive care at home also depend on mail order purchases. The development of access to home care services includes efforts to eliminate obstacles to that care. Since individuals receiving home care are often completely homebound, it is necessary that all the vital elements to living be brought into the individual's home. Tasks which are simple for most people, such as running an errand to the corner store, are literally impossible for individuals who are bed-bound, confined to wheelchairs, dependent upon medical equipment and services simply to survive to the next day.

Allowing the imposition of sales tax for out-of-state, mail order purchases would impede the feasibility of home care. If access to goods is restricted by reducing the viability of mail order merchandising by imposing sales tax obligations upon non-resident businesses, the ability of home care patients to remain in their homes will be correspondingly reduced. Likewise, the increased costs of mail order products that would result from the additional administrative burdens upon mail order merchandisers would limit home care for patients with limited incomes and resources.

The Amici therefore have a keen interest in the matter before the Court because any change to the time-honored standard set by the Court in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967) would cause a direct, substantial, and negative impact on all mail order consumers—and particularly specially challenged consumers—and the market in which they function. Retreating from *Bellas Hess* would substantially increase the administrative costs for mail order companies, and would cause the companies either to go out of business or to attempt

to pass along the costs to the mail order consumer. Either result would restrict the access of mail order consumers to this vital segment of the retail market. A reversal of *Bellas Hess* would also make it more complicated for consumers to purchase by mail.

The mail order market provides a valuable and often indispensable service to all types of consumers. Again, a significant portion of mail order consumers are persons with limited ability to shop by conventional means,<sup>2</sup> and many national direct marketing companies offer products specifically tailored to the needs of consumers such as the elderly and the disabled.<sup>3</sup> These companies offer specialized products for which local demand often would not support a retail store. The availability of mail order products results in a better variety of products at more competitive prices than are available through local retail outlets.

Further, for rural residents, many products are un-

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<sup>2</sup> See *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcommittee on Monopolies and Commercial Law, 100th Cong., 2d Sess., 222* (testimony of Cyril Brickfield, Honorary President and Former Executive Director of the American Association of Retired Persons) ("Increased sales tax collection would be particularly costly to those who are most dependent on mail order purchases; the very old, the homebound, the handicapped, and those who live in rural areas [for whom] there is often no practical alternative but mail order. . . . Statistics by the Bureau of Census demonstrate that these dependent people are more likely to be low income than any other portion of the population.").

<sup>3</sup> There are more than 26 million Americans, 65 or older, with functional limitations. *Statistical Abstract of the United States* at 120 (110th ed. 1990.)

available at any price in local retail facilities.<sup>4</sup> In the absence of a viable mail order industry, rural consumers would simply not be able to enjoy the full array of merchandise that is available in the American marketplace. The mail order merchandising made possible by *Bellas Hess* has resulted in a broad array of goods for rural consumers that previously were beyond their reach. In addition, single parents, working parents, and those who cannot afford child-care also rely heavily on mail order purchases. The critical availability of goods to all of these consumers would be severely threatened by a reversal of *Bellas Hess* and the inevitable decline in mail order merchandising that would result therefrom.<sup>5</sup>

Mail order opportunities enrich the marketplace by providing greater choices to consumers.<sup>6</sup> Competition

<sup>4</sup> Rural residents comprise 23.4% of mail order consumers. *Simmons Study of Media and Markets* (Simmons Market Research Bureau 1990).

<sup>5</sup> Reversal of *Bellas Hess* could result in many mail order companies refusing to continue to offer their products in those states in which the population levels or the complexity of the tax code made it no longer economically feasible to continue to serve that market. This would constitute an additional threat to the disabled and rural consumers since it would be the sparsely populated states, which generally have fewer products available in retail markets, that would most likely be cut off from further mail order merchandising.

<sup>6</sup> Mail order companies also facilitate wide dissemination of reading and educational materials, often to consumers that could not otherwise obtain such materials. Because many mail order publishers operate with low profit margins, imposition of inevitably staggering tax-collection costs would drive many such companies out of business and significantly reduce access to these vital educational resources. See *Interstate Sales Tax Collection*

from mail order marketers generally provides desirable incentives for all retailers to provide product and services innovation as well as lower prices, which enhances consumer welfare.<sup>7</sup> However, the significant administrative burdens that would befall mail order companies should the status quo be upset would hamper the workings of the marketplace. Increased expenses to mail order companies would, in turn, cause higher prices and reduced availability of products. The healthy competitive effect that mail order has had on the economy in fostering the optimal mix of goods and services at the lowest prices would be jeopardized by a rejection of *Bellas Hess*.

Despite its advantages for certain consumers, there are certain disadvantages in mail order purchasing vis-a-vis retail stores. For example, mail order consumers must pay shipping and handling charges, which often exceed state and local sales taxes. Also, unlike the instant gratification of retail shopping, mail

*Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcommittee on Monopolies and Commercial Law, 100th Cong., 2d Sess., 215-16 (1988) (statement of the Association of American Publishers) ("the burden of collection will fall hardest upon publishers of educational, professional and scholarly works"); Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcommittee on Select Revenue Measures, 100th Cong., 1st Sess., 145 (1987) (statement of the Magazine Publishers Association) (noting substantial benefit of mail-order publishing to consumers outside major metropolitan areas and inevitable loss of readership that would attend a price rise due to the increased administrative costs of companies in collecting sales and use taxes).*

<sup>7</sup> See, e.g., R. Bork, *The Antitrust Paradox, A Policy At War With Itself*, Ch. 4 (1978) (describing the competitive model and the benefits to consumer welfare of competition).



order consumers must wait for their products. Since many consumer purchases are impulsive in nature or based on instant needs, mail order consumption cannot satisfy this consumer preference. Mail order consumers also face risks associated with not being able to inspect or try on products for fit prior to purchase, which often results in the increased costs and inconvenience of returning merchandise by mail.

Mail order consumers' concern about a reversal of *Bellas Hess* does not stem from a desire to avoid paying the sales and use taxes.<sup>8</sup> The concern instead is that a reversal of the *Bellas Hess* standard would result in a loss of consumer options, higher prices for products sold both in stores and by mail, and severe burdens on the disabled, the elderly, and the rural residents who depend on this form of consumption.

In fact, consumers would likely prefer some rational and effective method for direct collection of use taxes from them by their own state. States requiring annual income tax returns could collect use taxes with relative ease. In this way, the consumer pays the tax at one time. In going through his or her check registers and credit card monthly statements, which must be done in preparing income tax returns, a person can easily determine the amount of purchases made from out-of-state companies and then calculate the amount of use taxes. This is the system of use tax collection employed in Maine and New Jersey, and it appears to work reasonably well.

Mail order consumers are concerned about the difficult and unfair burdens that would be placed on

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<sup>8</sup> A 1988 Gallup Poll found that 76% of mail order consumers view sales tax as irrelevant when deciding to purchase a product.

them if they were required to calculate the tax at the time of purchase. Before ordering a product, the mail order consumer first would have to determine what state and local tax is applicable. Because the state of destination of the product would be controlling, mail order consumers sending gifts would have to know the tax provisions not only of their own state but also the state of destination. The consumer would have to determine whether the item is tax-exempt. Products may be totally exempt, exempt for particular purchasers, or exempt for particular uses. Exemptions, of course, vary from state to state, so a grandmother in Indiana sending identical gifts to grandchildren in Illinois, California, and Ohio, would have to check exemptions for local and statewide taxes in six different jurisdictions.

Such an exercise could be particularly complicated depending on the product involved. If the gift sent to Illinois, California and Ohio is a fruit and cheese basket, for example, the grandmother might find that among the six jurisdictions the food items may be exempt while the basket is taxable; the entire item may be exempt; the entire item may be taxable; or the taxable or exempt status may depend on the relative value of the food and non-food items.

The difficulties in determining the tax exempt status of products are similar if the mail order consumer is purchasing the product for his or her own use. The tax-exempt status of a pair of shoes and a belt may depend on whether the shoes are "footwear" or "sportswear" and whether the belt is "clothing" or an "accessory".

Once the issue of taxability is settled, the mail order consumer would have to determine applicable tax



rates. Forty-five states plus the District of Columbia charge a sales tax, with rates ranging from 1% to 10%. Of those, many states also have varying county, local or transit district taxes.<sup>9</sup>

The mail order consumer must then consider shipping and handling charges. In some jurisdictions, such charges are entirely exempt from use taxes and in others they are entirely taxable. In some jurisdictions, handling is taxed but shipping is not. Shipping and/or handling may or may not be taxable if the purchaser or the products are exempt.

After the consumer wades through the determination of rates, exemptions, and shipping and handling issues, the calculation of the tax still looms. If different products are part of the same order, some of which are taxable and some not, tax must be evaluated and calculated separately, and totalled.<sup>10</sup>

<sup>9</sup> In Ohio, for example, total tax rates—statewide and county/transit district—are calculated according to a complex tax bracket schedule system resulting in thirteen different possible overall tax rates. The table, brackets, and instructions that must be consulted in calculating these taxes comprise approximately forty pages of charts, tables, brackets, and regulations. See Ohio Tax Reports (CCH) ¶¶ 60-075 - 60-085. Such is obviously much more than a mail order catalog could include.

<sup>10</sup> Again, as shown by the Ohio example, catalogues cannot possibly provide the volumes of information needed for a thorough canvassing of relevant tax laws. But even a more modest, marginally adequate explanation of tax computation imposes enormous costs on mail order companies. See *Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcommittee on Monopolies and Commercial Law, 100th Cong., 2d Sess. 206 (1988)* (statement of William T. End, Executive Vice President of L.L. Bean, Inc.) (estimating

The 1991 catalog of a popular chain of stores, The Sharper Image, illustrates the practical difficulties faced by consumers in calculating sales taxes. The order form demonstrates the complexity of computation:

#### SALES TAX INFORMATION:

For shipment to the following states, please add sales tax at the appropriate rate (state and, if any, local and transit). Figure tax on merchandise. If shipment is to a state marked "\*\*\*", apply tax to delivery charges as well. [State abbreviations follow].

Mail order consumers, as represented by the Amici, have a compelling interest in preserving maximum access to mail order products that their personal circumstances render essential, or that otherwise enrich the consumer marketplace. Mail order consumers assert a further interest in avoiding the burdens that self-computed taxation would impose. For these reasons, the Amici urge the Court to strike down the North Dakota court's repudiation of Supreme Court precedent and reaffirm the sound principles embodied in *Bellas Hess*.<sup>11</sup>

that "using catalogue space to explain the sales tax rates and exemptions of the 46 taxing jurisdictions would have had a direct cost in 1987 of \$950,000 and an opportunity cost of \$9.5 million of lost sales by reason of devoting valuable catalogue space for this purpose").

<sup>11</sup> A solution to this problem would be federal legislation mandating some uniform mail order tax requirements. But this point only underscores the wisdom of the Court's previously unquestioned precedent, which left regulation of interstate mail order commerce to the branch of government specifically granted such regulatory authority by the Constitution. The Congress is best

## SUMMARY OF ARGUMENT

A state's imposition of tax collection and remittance obligations on mail order firms with no presence in that state unjustifiably burdens interstate commerce. The unwarranted harm inflicted upon mail order firms by burdensome regulations would ultimately afflict consumers in the form of higher prices and more limited access to goods. The commerce clause abhors such effects. Any legitimate state purpose could be accommodated by less disruptive means.

No constitutionally significant changes in the nature of the mail order market have occurred since *Bellas Hess* was decided. Only the size of the mail order market and the complexity of complying with the regulations of multiple jurisdictions have increased. Given the absence of significant market change, the Court should reverse the court below, reaffirm *Bellas Hess*, and preserve the fair and diverse interstate market that has flourished under the constitutional protections of the Court's precedent.

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equipped to deal with the practical complexities and numerous policy alternatives regarding mail order taxation. The Congress has often considered, and so far rejected, legislative reconsideration of the status quo. See S. 282, 93rd Cong., 1st Sess. (1973); S. 2092, 93rd Cong., 1st Sess. (1973); S. 2811, 93rd Cong., 1st Sess. (1973); S. 2173, 95th Cong., 1st Sess. (1977); S. 983, 96th Cong., 1st Sess. (1979); S. 1510, 99th Cong., 1st Sess. (1985); H.R. 3549, 99th Cong., 1st Sess. (1985); S. 639, 100th Cong., 1st Sess. (1987); S. 1099, 100th Cong., 1st Sess. (1987); H.R. 1242, 100th Cong., 1st Sess. (1987); H.R. 3521, 100th Cong., 1st Sess. (1987); H.R. 1891, 100th Cong., 2d Sess. (1987); S. 2368, 100th Cong., 2d Sess. (1988); S. 480, 101st Cong., 1st Sess. (1989); and H.R. 2230, 101st Cong., 1st Sess. (1989).

## ARGUMENT

**NORTH DAKOTA CONTRAVENES THE COMMERCE CLAUSE BY IMPOSING DISPROPORTIONATE TAX COLLECTION OBLIGATIONS ON OUT-OF-STATE MAIL ORDER COMPANIES, WHICH RECEIVE NO BENEFIT FROM THE STATE; AS A RESULT THE OPEN MARKET UPON WHICH CONSUMERS RELY IS IMPERILED.**

"It has long been accepted that the commerce clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979), *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 534-535 (1949), *Welton v. Missouri*, 91 U.S. 275 (1876)). This negative implication of the commerce clause prohibits state laws "designed to benefit in-state interests by burdening out-of-state competitors." *Id.* Moreover, the Court has rejected commerce clause analysis that focuses merely on "the character of the privilege" of engaging in interstate commerce, rather than on the "practical consequence[s]" of the state laws on interstate commerce. *American Trucking Ass'n, Inc. v. Scheiner*, 483 U.S. 266, 294-295 (1987) (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279-281 (1977)). "State taxation . . . falling on interstate commerce . . . can only be justified as designed to, make such commerce bear a fair share of the cost of the local, government whose protection it enjoys." *Bellas Hess*, 386 U.S. at 756 (quoting *Freeman v. Hewit*, 329 U.S. 249, 253 (1946)).

The commerce clause embodies an interest in open markets and the operation of market forces. See, e.g.,



*Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 335 (1977) (noting "free trade purpose" of commerce clause); *Transcontinental Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 435 (1986) (Rehnquist, J., dissenting) (acknowledging "implicit 'free market' purpose" of the commerce clause); *American Trucking Ass'ns*, 483 U.S. at 281 (commerce clause acts in part as a "guarantee of a free trade area among States"); see also Federalist 11 (Hamilton) (commerce clause and free interstate commerce will make available a variety of goods from the several states).

North Dakota's attempt to impose tax collection and remittance requirements on out-of-state mail order companies with no presence in the State violates these sound principles of commerce clause jurisprudence. It works a substantial hardship on consumers, the ultimate beneficiaries of our open markets. See Statement of Interests, *supra*.

Overturing *Bellas Hess* would greatly burden out-of-state companies because they would incur disproportionate and substantial administrative costs. Unlike local retailers who can collect taxes at the point of sale with relative ease and assurance, the out-of-state retailers would rely in large part on customer calculation and payment. Consumers will often fail to remit the proper amount of tax, or fail to remit tax at all. Out-of-state companies must then expend resources either tracking down the customer to collect the tax deficiency, or, more likely, simply pay the customer's tax themselves. Although the tax rates are the same for in-state and out-of-state companies, the differing burdens on their respective customers and

the differing burdens of compliance demonstrate the excessive hardship placed on the out-of-state firms.

The *Bellas Hess* Court expressed alarm that with over 2,300 states and localities capable of imposing use taxes, the "many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government'." 386 U.S. at 759-760 (citations omitted). The burdens to out-of-state mail order companies of tax collection have increased threefold since *Bellas Hess*. There are now over 6,139 sales and use tax jurisdictions. Further, although in 1967 there were seven different tax rates that ranged from two to five percent, there are now ninety different state-wide tax rates ranging from one to ten percent, and hundreds of additional local rates.<sup>12</sup> The "entangle-

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<sup>12</sup> Computers will not alleviate these burdens. Computers cannot assist out-of-state mail order companies in dealing with audits, for example. The large number of tax jurisdictions expose the out-of-state firms to a bewildering array of audits from different jurisdictions. Further, computers cannot solve the problems associated with tax collection. The "post-sale collection costs" that the out-of-state firms will face is enormous, as many consumers will fail to comply accurately with complex tax computation and payment requirements. These collection costs will often be greater than the collectable tax and, thus the companies will simply pay it themselves. Finally, no available computer programs can determine the exempt products and unique circumstances leading to exemptions throughout the number of tax jurisdictions. See generally *Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S. 593 and S. 1099 Before the Subcommittee on Taxation and Debt Management*,



ments" that concerned the Court in 1967 have worsened in 1991. To let the North Dakota court's decision stand would result in a great disservice to consumers.

Because these tax collection and remittance burdens effectively place the products of out-of-state companies at a "substantial commercial disadvantage", they offend the commerce clause. *New Energy Co.*, 486 U.S. at 275, (citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 349-351 (1977) (invalidating under the commerce clause a North Carolina statute that did not exclude apples from other states, but merely imposed additional costs upon Washington sellers and deprived them of their relative commercial advantage.))<sup>13</sup> As in *New Energy* and *Hunt*, out-of-state mail order goods—and the consumers who use them—would suffer distinct burdens vis-a-vis the goods of in-state retailers if this Court overrules *Bellas Hess*.<sup>14</sup>

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100th Cong., 1st Sess. 52 (1987) (testimony of Alan Glazer); *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcommittee on Select Revenue Measures*, 100th Cong., 1st Sess. 178 (1987) (testimony of Heath Kline).

<sup>13</sup> Out-of-state goods need not be completely banned in order to find a Commerce Clause transgression. *New Energy Co.*, 486 U.S. at 275; *Hunt*, 432 U.S. at 349-351.

<sup>14</sup> The burden on interstate commerce caused by the tax obligations does not affect all mail order firms equally. Currently in-state companies with mail order options and other mail order companies with the requisite nexus have collection and remittance obligations. But as the *Bellas Hess* court acknowledged, companies with a presence in the state have thereby established some *quid pro quo* that justifies the imposition of tax burdens. 386 U.S. at 756. Those companies have received benefits from the state by their physical presence. Moreover, the mail order companies with retail stores in the state can make up some of

Moreover, the imposition of tax collection obligations by a state especially offends the commerce clause when the burdened firm has no presence in the state and the state thus has "no legitimate claim to impose 'a fair share of the cost of the local government'." *Bellas Hess*, 386 U.S. at 760 (citations omitted). The North Dakota Supreme Court concluded, however, that mail order companies receive substantial benefits from a state because they send catalogs to residents of the state, and these benefits outweigh the burdens to mail order companies. The North Dakota court's conclusion, however, is wrong. If there is any benefit conferred by the state governments from catalog disposal, the benefit is provided to the mail order customers, who are the residents of the state and pay state and local costs to support the cost of solid waste disposal. Catalogs are valuable tools to assist consumers in selecting products to purchase. Consumers who purchase products by mail need the catalogs to determine what to purchase. The consumers decide when they wish to discard the catalogs, as is the case for magazines and other periodicals.<sup>15</sup>

In sum, as discussed in the *Interests of Amici Curiae* section, the consumers' interest would be ad-

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the lost sales through their stores as consumer preferences change. The ultimate question of whether the state has impermissibly burdened interstate commerce requires a balancing of interests and equities and an evaluation of the State's justifications. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); *Maine v. Taylor*, 477 U.S. 131 (1986). An in-state presence tips the balance in favor of the state.

<sup>15</sup> The consumers pay local taxes that support the cost of trash collection of their household products, including catalogs. There is no logic in allocating the cost of waste collection to different components of a resident's trash.

versely affected if *Bellas Hess* were overruled. Undue and unnecessary restrictions on the free flow of goods in interstate markets would be imposed by burdening mail order companies with use tax collection in jurisdictions throughout the country, all to the detriment of the consumer interest. At the same time, mail order companies do not receive the benefits of a local presence in these markets.

Furthermore, legislative judgments of the type made by the North Dakota court should be left to Congress, which has the best ability to weigh all the interests involved. See *Bendix Autolite Corp. v. Midwesco Enterprises*, 486 U.S. 888, 897 (1987) (Scalia, J., concurring) (recommending abandonment of the *Pike* test and urging deferral to Congress and adherence to *stare decisis*). Certainly, the states can seek redress through federal legislation. As the *Bellas Hess* Court noted, "[u]nder the Constitution, this is a domain where Congress alone has the power of regulation and control." 386 U.S. at 760. The appropriateness of congressional action in this area, as opposed to either state or judicial action, further weakens the justifications for multiple state burdens on interstate commerce. The Court should thus reject North Dakota's attempt to disrupt the status quo, and allow Congress to act, pursuant to its exclusive constitutional mandate, if through its legislative judgment it deems that additional regulation of interstate commerce is appropriate.

## CONCLUSION

For these reasons Amici respectfully submit that the judgment below should be reversed.

Respectfully submitted,

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